Federal Court  Cour fédérale

Date: 20231215

Docket: IMM-7547-22

Citation: 2023 FC 1699

Ottawa, Ontario, December 15, 2023

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ZHOU YE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision (the "Decision") by a delegate of the Minister (the "Minister's Delegate") finding that Mr. Zhou Ye (the "Applicant") constitutes a danger to the public in Canada pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Decision effectively permits the removal of the Applicant from Canada, despite the fact that he is a refugee.

II. Background

[2] The Applicant is a citizen of China. He is 41 years old.

[3] The Applicant entered Canada in 2003 on a study permit. He was granted refugee status in 2004. In 2005, he became a permanent resident under the Convention refugee class.

[4] Between 2009 and 2017, the Applicant was criminally charged numerous times, but his charges were mostly stayed or withdrawn. Among the charges in that period was (1) possession of property obtained by crime, (2) possession of instruments for forging or falsifying credit cards, (3) possession of instruments for copying credit card data, (4) attempt to commit an offence related to a break and enter, (5) extortion, and (6) assault. The only convictions from this period were in relation to the Applicant's failure to comply with various recognizances.

[5] In 2017, the Applicant was found guilty of a number of criminal offences, including armed robbery contrary to section 343(d) of the *Criminal Code* [*Code*], for which he was liable to imprisonment for life. He was sentenced to six years and nine months and began serving his sentence in January 2018. In February 2018, he was also found guilty of breaking, entering, and committing an indictable offence contrary to section 348(1)(b) of the *Code*, for which he was liable to imprisonment for life.

[6] In June 2018, the Applicant was made the subject of an inadmissibility proceeding and was personally served a request for submissions by the Canada Border Services Agency (the "CBSA").

He made no submissions prior to his hearing in April 2020. He was found to be inadmissible for serious criminality pursuant to paragraph 36(1)(a) of the *IRPA*. This is not the decision under review.

[7] Under subsection 115(1) and paragraph 115(2)(a) of the *IRPA*, and notwithstanding the finding that he is inadmissible for serious criminality, the Applicant could not be removed from Canada unless it was also the opinion of the Minister's Delegate that the Applicant constituted a danger to the public in Canada. The CBSA therefore notified the Applicant in October 2020 of its intention to seek such an opinion from the Minister.

[8] Pursuant to section 115 of the *IRPA*, the Minister's Delegate formed the opinion that the Applicant constitutes a danger to the public in Canada.

III. The Decision

[9] The Minister's Delegate considered: (1) whether the Applicant constitutes a danger to the public (the "danger assessment"); (2) whether the Applicant would suffer any risk of harm if removed from Canada (the "risk assessment"); and (3) whether there were humanitarian or compassionate grounds against his removal (the "H&C assessment"). The Minister's Delegate weighed those factors to arrive at the final opinion.

[10] The Minister's Delegate also considered whether the Applicant was indeed inadmissible for serious criminality. The Minister's Delegate observed that, under paragraph 36(1)(a) of the *IRPA*, serious criminality is established where a permanent resident is convicted of an offence in

Canada under a federal statute that is punishable by a maximum term of 10 or more years of imprisonment. Based on the Applicant's convictions, the Minister's Delegate was satisfied that he was inadmissible for serious criminality.

A. *The Danger Assessment*

[11] The Minister's Delegate took note of the circumstances surrounding his criminal convictions. Regarding his 2017 convictions, the Minister's Delegate observed the following facts:

A. the Applicant broke into a commercial unit wearing a balaclava;

B. the Applicant and the co-accused carried a gun and a six-inch blade knife and pointed them at the victim, who was sleeping in the commercial unit with the owner's permission;

C. the Applicant and the co-accused tied the victim's hands and feet, placed him in a chair, and covered his head so he could not see;

D. the Applicant and the co-accused stole electronics from the commercial unit, along with the victim's passport, credit cards, and van, among other things; and

E. the Applicant and the co-accused were caught by police officers who were on patrol in the area.

[12] Regarding his 2018 convictions, the Minister's Delegate noted the following:

A. the Applicant and the co-accused broke into a residential unit;

B. the home owner later identified the Applicant and co-accused's vehicle and was able to identify the Applicant's address; and

C. police searched the vehicle and found tools used for breaking and entering and were able to confirm that the Applicant was in the residential unit on the day and time of the break-in.

[13] The Minister's Delegate summarized the existing jurisprudence on what constitutes a "danger to the public" and concluded that the determinative question is whether the Applicant is likely to re-offend in light of his history of serious crimes.

[14] The Minister's Delegate accepted the Applicant's submission that withdrawn and stayed charges are not convictions. The Minister's Delegate also accepted that the Applicant's actual convictions arose out of a few incidents. However, the Minister's Delegate rejected the Applicant's argument that the withdrawn and stayed charges should be disregarded. The Minister's Delegate instead found that the Applicant's non-conviction record is still relevant, since it demonstrates that the Applicant has a long history of being *charged* with criminal offences. This finding was, in the Minister's Delegate's view, justified in light of the Applicant's own submission that he made poor choices prior to engaging in criminal activities.

[15] The Minister's Delegate then reviewed a report from the institution in which the Applicant is serving his sentence. The Minister's Delegate noted the report's finding that the Applicant's armed robbery showed an "escalation of his propensity to use violence".

[16] The Minister's Delegate took note that there were no victim impact statements in the record. However, the Minister's Delegate concluded this was not a significant consideration and did not diminish the seriousness of the Applicant's offences.

[17] The Minister's Delegate also considered the Applicant's submission that his security classification at the correctional institution show that he is not a dangerous individual. The Applicant stressed that he was not designated a "Dangerous Offender" within the institution. However, the Minister's Delegate found that the institution's classifications are not relevant to the analysis at hand, since they did not address the Applicant's risk of recidivism and whether he is a danger to the public. The Minister's Delegate also observed that the most recent reports from the Applicant's correctional institution state that he is a moderate public safety risk, that he was not rehabilitated, and that he had failed to show remorse or accept responsibility.

[18] Taking all the above into account, the Minister's Delegate found that, on a balance of probabilities, the Applicant "represents a present and future danger to the Canadian public".

B. *The Risk Assessment*

[19] The Applicant argued that his removal from Canada to China would place his life in danger, because he is a practicing Falun Gong member. The Minister's Delegate did not accept that the

Applicant was a practicing Falun Gong member, finding that there was no evidence in support of that claim. There were no references in his correctional records nor any court documents regarding his religious or spiritual practices. There was also no record of why he was deemed a Convention refugee in 2004.

[20] The Minister's Delegate also found that, in the alternative, even if the Applicant was a practicing Falun Gong member, the Applicant's own evidence indicates that he would only face risk of harm if his practice is public, if he tries to recruit new members, or if he disseminates Falun Gong information. There was no indication that the Applicant engaged in any of those practices.

[21] The Applicant also submitted that China's record shows a general disregard for human rights, specifically with respect to the Uighurs, certain foreign nationals, and those "deemed in need of reeducation [*sic*]". The Minister's Delegate did not dispute the Applicant's assertions regarding China's general human rights record, but concluded none of the issues raised engage the Applicant himself.

[22] The Minister's Delegate concluded that, on a balance of probabilities, the Applicant is unlikely to face any personal risk to his life, liberty, or security.

C. *The H&C Assessment*

[23] The Minister's Delegate considered the Applicant's establishment in Canada, and the best interests of his child, who lives in Canada with the child's mother.

[24] Regarding establishment, the Minister's Delegate observed that the Applicant struggles to speak English despite living in Canada since 2003 and that he has mainly associated with others who share his first language. The Minister's Delegate also rejected the Applicant's submission that he worked in a restaurant for seven years. The Minister's Delegate found no proof of this assertion and noted correctional reports that say that the Applicant only worked sporadically and "under the table", had no desire to work or go to school, and that this lifestyle continued until his arrest for armed robbery. The Minister's Delegate found that the Applicant was not established in Canada, either socially or financially.

[25] Regarding the best interests of the Applicant's child, the Minister's Delegate found that the Applicant's relationships with his child and the child's mother were sporadic at best. The Minister's Delegate concluded that the Applicant's removal from Canada is unlikely to affect his child in a significant way.

[26] Finally, the Minister's Delegate observed that the Applicant has family in China – namely his parents and his twin brother.

[27] The Minister's Delegate concluded that the H&C considerations do not outweigh the Applicant's danger to the public in Canada, and that he may be removed to Canada pursuant to paragraph 115(2)(a) of the *IRPA*.

[28] The Applicant says that the Minister's Delegate's substantive conclusions were unreasonable. He also says that the Minister's Delegate breached procedural fairness.

IV. Issues

[29] Was the Minister's Delegate's decision finding the Applicant a danger to the public and therefore removable from Canada unreasonable?

[30] Did the Minister's Delegate breach procedural fairness?

V. Analysis

[31] The standard of review with respect to the Minister's Delegate's substantive findings is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25). The standard of review with respect to the Applicant's procedural rights is correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-35 and 54-55, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79).

A. *Substantive Challenges*

[32] The Applicant alleges that the Minister's Delegate's substantive findings are unreasonable. In support of his position, the Applicant says that the Minister's Delegate failed to consider that:

A. the Applicant's criminality was attributable to his addiction to illicit substances;

B. the Applicant is no longer using any illicit substances;

C. the Applicant had “no institutional charges during his incarceration”;

D. the Applicant was given a “66% [likelihood] of not reoffending following release”;

E. the Applicant was classified as a minimum security risk within his correctional institution; and

F. the Applicant’s convictions arise out of one incident.

[33] In fact, the Minister’s Delegate considered each of those factors at length. The Minister’s Delegate noted the Applicant’s “illegal drug use” before and after his arrest, as well as the fact that he “has not incurred any institutional charges while incarcerated”. The Minister’s Delegate did not give these facts any weight and concluded that “whether [the Applicant] can avoid relapsing while back in the community remains untested”. The Minister’s Delegate went on to find that the Applicant was not rehabilitated. It was reasonable of the Minister’s Delegate to arrive at this conclusion based on the evidence.

[34] The Minister’s Delegate also considered the Applicant’s security classification and likelihood to reoffend. The Minister’s Delegate noted in particular that the Applicant’s “excerpts do not reflect the full contents of the most recent Correctional Services reports”, which state that the Applicant was a medium security risk, had low institutional adjustment, and posed moderate risk to the public’s safety. The Minister’s Delegate was reasonable in concluding that the reports show moderate public safety risk.

[35] Moreover, the Minister's Delegate addressed the distinction between the Applicant's record of convictions and his record of charges. The Minister's Delegate agreed with the Applicant's submissions that his convictions are limited to a narrow range of time, but refused to disregard the history of charges against the Applicant. The Minister's Delegate found that that record was still relevant. It was open for them to make such a finding.

[36] The Applicant also argues that the Decision is unreasonable based on the following submissions:

A. the Minister's Delegate failed to make a finding on the Applicant's ability to speak English and whether this impeded his ability to express remorse;

B. the Minister's Delegate unreasonably inferred from the absence of any refugee claim records that the Applicant was not a practicing Falun Gong member; and

C. the Applicant's twin brother's circumstances post-removal were irrelevant and the Minister's Delegate's reliance on those circumstances was unreasonable.

[37] The Minister's Delegate did in fact find that the Applicant's ability to speak English was weak. On the question of remorse, the Minister's Delegate simply gave greater weight to correctional reports stating that the Applicant continued to deny responsibility. This was reasonable.

[38] Contrary to the Applicant's submissions, the Minister's Delegate did not simply base his finding as to the Applicant's religious and spiritual practice on the absence of refugee claim records. The Minister's Delegate also observed that the Applicant's practice was not noted in any record at all, including correctional records or court records. The Minister's Delegate simply drew an inference from the evidence that was before them, and noted that the Applicant offered no real evidence to the contrary. The Minister's Delegate's conclusion was reasonable.

[39] As well, the Minister's Delegate's observation that the Applicant's twin brother was removed from Canada without any indication of harm was not determinative or critical to the Minister's Delegate's risk assessment. I read the observation to be an example of the Applicant's failure to adduce any objective evidence of potential harm if he is removed from Canada.

[40] The Applicant says that "there was no official conviction involving violence or direct victims from his index offences". However, the index offence is *armed* robbery, contrary to section 343(d) of the *Code*. The Applicant, along with the co-accused, forcibly confined the victim and threatened him with a knife and a gun.

[41] The Applicant adds that the Minister's Delegate's suggestion that the victim experienced fear at the hands of the Applicant and the co-accused was speculative. Speculation is an inference drawn too far. Here, the Minister's Delegate inferred that a person experienced fear while being forcibly confined and threatened with a gun and knife. That inference was both logical and reasonable.

[42] The Minister's Delegate's substantive findings are reasonable.

B. *Procedural Fairness*

[43] The Applicant argues that the Minister's Delegate breached procedural fairness. He makes the following submissions in support of this view:

A. the removal order was incomplete, as it failed to inform the Applicant of the statutory basis for removal;

B. the disclosure package was not numbered and did not include any decision by the Immigration and Refugee Board (the "IRB"), nor the Applicant's 2003 Basis of Claim form, nor any permanent residence application;

C. the Minister's Delegate did not notify the Applicant to provide records of his refugee claim; and

D. the disclosure package omitted the most recent Ministerial Opinion Report.

[44] The Minister's Delegate made no procedural error. The removal order was the *outcome* of an admissibility hearing, a wholly separate matter. Moreover, according to the record, the Applicant was provided with notice, as well as disclosure, in relation to that admissibility hearing. Within that disclosure were various references to the legislative provisions regarding serious criminality. Even though the removal order itself did not contain such a reference, the Applicant

was clearly made aware and had ample opportunity to make submissions in relation to that admissibility hearing.

[45] The Applicant suggests that a technical defect in the removal order somehow prejudices the process followed by the Minister's Delegate to arrive at the Decision. However, at no point did the Applicant argue that the admissibility hearing was itself procedurally unfair or substantively unreasonable. The Applicant simply says that the removal order was improper due to a technicality, and that this should invalidate not only the Decision before the Court on review, but also the admissibility hearing that preceded it, even if there is no other reason for the Court to intervene.

[46] In *Parveen v Canada (Citizenship and Immigration)*, 2019 FC 155 [*Parveen*], the Court was faced with a more noteworthy deficiency. The Applicant argued that the Refugee Protection Division's decision that she had abandoned her refugee claim was procedurally unfair because the decision was delivered orally instead of in writing. The Court rejected that argument and stated as follows:

> 21 In the circumstances, while the letter of the law may impose a duty to provide written reasons, it would be odd to set aside the RPD's decision on the sole basis that a written copy of the decision has not been provided to the Applicant. I do not think there has been any breach of the fairness standard. Deciding otherwise would appear to me to be a triumph of form over substance. I find there has been no substantial wrong or miscarriage of justice (*Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.) at para 43; *Pavicevic v. Canada (Attorney General)*, 2013 FC 997 (F.C.) at paras 55-56). Subsection 18.1(5) of the *Federal Courts Act*, RSC 1985, c F-7 empowers this Court to decline to grant relief in such a case.
>
> [Emphasis added.]

[47] In my view, and for the same reasons cited in *Parveen*, there is no procedural unfairness arising out of the deficiency in the removal order as noted by the Applicant. The error was inconsequential. To allow it to invalidate two proceedings would be a "triumph of form over substance".

[48] As well, there is no strict procedural requirement to attach page numbers to the disclosure package. I do not accept the Applicant's submission that the disclosure was confusing because it did not include page numbers. Furthermore, the Decision is clear that the Minister's Delegate requested the Applicant's records, only to learn that they were destroyed pursuant to existing retention schedules. The Minister's Delegate simply could not provide the requisite documents. There was no procedural unfairness here.

[49] Moreover, the disclosure package in itself constituted implicit notice of what the Minister's Delegate had as evidence before them. The onus was on the Applicant, not the Minister's Delegate, to adduce evidence in support of his claim that he was a practicing Falun Gong member, and in light of the documents before the Minister's Delegate. The Applicant adduced no evidence in support of that claim.

[50] Finally, there is no evidence to support the Applicant's allegation that the disclosure package did not include the most recent Ministerial Opinion Report. The Applicant simply cites the cover letter of the disclosure package, which says the Ministerial Opinion Report was dated January 14, 2022. That date was clearly written in error, and was instead intended to refer to the Request for Minister's Opinion. In fact, the Request for Minister's Opinion confirms that the

Ministerial Opinion Report is dated December 3, 2020, which the Applicant admits to having received.

[51] The Minister's Delegate did not breach procedural fairness.

VI. Question for Certification

[52] The Applicant proposes the following question for certification:

> If a Minister's Delegate renders a serious criminality assessment in place of a valid removal order issued by the Immigration Division pursuant to section 115(2) a of the IRPA; is the danger opinion decision enforceable?

[53] The Applicant's proposed question suggests that the Minister's Delegate in this case attempted to perfect an invalid removal order by engaging in an independent serious criminality assessment. This is not borne out by the record. In my view, the Minister's Delegate was merely discussing serious criminality for context. Moreover, as discussed above, the removal order is not invalid because of any technical defects in form, particularly when those defects do not affect the fairness of the process nor the substance of the conclusion.

[54] The Respondent is also correct to observe that section 115 of the *IRPA* does not require that a removal order be issued prior to the Minister's opinion. All that it requires is a finding that the Applicant is inadmissible for serious criminality. Moreover, the Applicant's reliance on *Enforcement Manual ENF 28* disregards the fact that that policy manual is not law and therefore not binding.

[55] The proposed question does not contemplate issues of broad significance or general application, nor is it dispositive of the case at bar. I refuse to certify the proposed question.

VII. Conclusion

[56] The application is dismissed.

[57] There is no question for certification.

JUDGMENT in IMM-7547-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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